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No. 08-448

IN THE
Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL.,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* SONY BMG MUSIC ENTERTAINMENT, WARNER MUSIC GROUP CORP., UMG RECORDINGS, INC., ASSOCIATION OF AMERICAN PUBLISHERS, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INTERNATIONAL PUBLISHERS ASSOCIATION AND INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The "Volitional Act" Requirement Created By The Second Circuit Threatens *Amici*'s Established Rights By Absolving Clearly Infringing Copying Activity Based On An Unwarranted "Automation Exception" 5

II. The Second Circuit's Definition Of "Public" Performance Is Contrary To The Act And Threatens A Damaging Effect On *Amici* And Settled Practices For Licensing Their Protected Digital Works 14

III. The International Implications Of The Second Circuit's Ruling For The United States And International Rightholders Further Necessitate This Court's Review 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 26

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 7

Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984) 22, 23

Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) 6

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 26

New York Times Co. v. Tasini, 533 U.S. 483 (2001) 6

On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) 6, 23

Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (table decision) 6

Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996) 7, 8

Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) 5, 6, 9, 10

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 10

STATUTES AND REGULATIONS

17 U.S.C. § 101 ..... 14, 15
17 U.S.C. § 106 13
17 U.S.C. § 106(1) 6
17 U.S.C. § 106(4) 14, 16
17 U.S.C. § 106(6) 14, 16
17 U.S.C. § 112(a) 19
17 U.S.C. § 112(e) 19
17 U.S.C. § 114 15
17 U.S.C. § 114(d)(2) 18
17 U.S.C. § 114(d)(3) 15, 18
17 U.S.C. § 114(j)(6) 18, 19
17 U.S.C. § 114(j)(7) 18
17 U.S.C. § 501(a) 6
17 C.F.R. § 262.2(f) 19
Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as various amendments to 17 U.S.C.) 18
Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No 104-39, 109 Stat. 336 (1995) (codified as various amendments to 17 U.S.C.) 16
Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102) 16

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-274 (1995) 17

S. Rep. No. 104-128 (1995), *as reprinted in*, 1995 U.S.C.C.A.N. 356 ..... 16, 17

INTERNATIONAL AGREEMENTS

World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997) 24, 25, 26

World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) 25, 26

World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 81 (1994)..... 24

OTHER AUTHORITIES

Association of American Publishers Press Release (Oct. 28, 2008), *available at* http://www.publishers.org/main/Copyright/Google/Release.htm. 13

http://www.riaa.com/toolsforparents.php?content_selector=legal_music_sites..... 11

MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET (Oxford 2002). 25

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Sony BMG Music Entertainment, Warner Music Group Corp., UMG Recordings, Inc., Association of American Publishers, Association of American University Presses, International Publishers Association, and International Confederation of Societies of Authors and Composers (CISAC) are individual companies, trade associations and others who own and create (or who represent owners and creators of) some of the most valuable and well-known copyrighted works, including popular music and books. Recognizing the realities and potential of the digital age, *amici* have supported and promoted a host of new technologies in order to foster lawful ways of distributing their works via the Internet and comparable methods. *Amici*'s efforts have provided consumers with a wide variety of new means of accessing and enjoying *Amici*'s copyrighted content. Unfortunately, such efforts are threatened by those – like Cablevision – who seek to abuse technology to profit from copyrighted content without compensating the creators and owners. Indeed, as new means of authorized delivery of digital content have emerged,

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[1] Pursuant to Rule 37, the parties were provided with timely notice of the intent to file this brief and they have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

so too have unprecedented levels of digital piracy. Services that misuse new technology to attempt end-runs around settled copyright protections without compensating the creators and owners jeopardize copyright's incentive structure in the digital age. Cablevision's RS-DVR service is just one example.

Amici wish to demonstrate the potentially devastating impact of two of the Second Circuit's clearly erroneous rulings by illustrating how, as a practical matter, those rulings may jeopardize increasingly prevalent lawful means of distributing *Amici*'s copyrighted digital content. As *Amici* will show, these negative consequences are global in scope. *Amici* also seek to elaborate upon legal arguments demonstrating the need for this Court's review that are particularly relevant to protecting the types of works copyrighted by *Amici*, such as sound recordings and books.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit's decision cannot stand because it undermines basic copyright protections in the digital age. First, the unprecedented ruling below threatens to strip established rights of *Amici* by creating an unfounded "automation" exception to copyright protection. According to the Second Circuit, Cablevision is immunized from direct liability for copying and storing copyrighted content simply because it has automated its service and thus lacks the "volition" supposedly required for liability. This ruling is plainly wrong under established

precedent concerning direct liability for infringement of copyrighted material even where (as here) the customer "requests" that the infringement be performed. *Amici*'s works already are widely distributed by "automated" services, and, as technology continues to improve, such "automated" services will only continue to proliferate. Thus, the Second Circuit's novel gloss on "volition" seriously threatens the protection of *Amici*'s creative works.

Similarly harmful and contrary to settled law is the Second Circuit's unduly limited conception of a "public" performance. By holding that individual, on-demand transmissions are not "public" performances entitled to protection under the Copyright Act ("Act"), the Second Circuit's ruling threatens established performance rights in digital transmissions. That ruling also directly conflicts with the Act's settled licensing scheme for digital sound recordings, which repeatedly recognizes that individual transmissions, including on-demand transmissions, are "public" performances, notwithstanding that each such transmission is sent to a unique customer. The Second Circuit's ruling creates perverse incentives for services like Cablevision to massively copy copyrighted content in order to claim that delivery of individual transmissions of that content is not a "public" act. Because *Amici*'s copyrighted content is increasingly available through licensed "on-demand" Internet services, the Second Circuit's ruling threatens to upend these services and incentivize widespread

piracy of *Amici*'s works without any meaningful recourse for copyright owners like *Amici*.

These erroneous rulings threaten severe consequences both domestically and abroad. Content holders like *Amici* routinely authorize businesses to employ new and emerging technologies to distribute *Amici*'s works for a fee via "automated" processes. However, unlike other content-based services such as iTunes and Rhapsody (online music services), Kindle and Reader (online e-book services), GameTap (an online gaming service) and Movielink (an online movie provider), Cablevision has chosen to amass, copy and transmit copyrighted digital content without authorization. The Second Circuit has placed Cablevision at an inappropriate competitive advantage to such lawful services. Moreover, under the Second Circuit's decision, services that allow their users to select digital content for download may attempt to argue that no authorization is needed simply because the subscriber selects the works to download and receives the download through an automated, "on demand" process. By allowing Cablevision to appropriate copyrighted content without compensating creators, the Second Circuit's decision creates an unprecedented exception to the Copyright Act that undermines the economic incentive system upon which copyright law is based.

The Second Circuit's decision also will have undesirable global consequences. It directly conflicts with the international treaty obligations of the United States to protect the rights of copyright

holders. Moreover, it will jeopardize international agreements regarding the use of digital content and will encourage other countries to erode copyright protections like the Second Circuit has.

ARGUMENT

I. The "Volitional Act" Requirement Created By The Second Circuit Threatens *Amici*'s Established Rights By Absolving Clearly Infringing Copying Activity Based On An Unwarranted "Automation Exception."

1. It is undisputed that Cablevision chooses the copyrighted works made available to its customers; that Cablevision's servers make huge numbers of copies of copyrighted works; and that Cablevision stores these copies on its server for subsequent transmission to its customers. Pet. App. 4a-6a. Yet, the Second Circuit exempted Cablevision from direct liability for this profligate copying of copyrighted works due to its erroneous conclusion that "volitional conduct is an important element of direct liability" and that Cablevision categorically lacks the necessary volition because the copies "are made automatically upon [a] customer's command." Pet. App. 21a, 22a. Both conclusions are wrong.

As Petitioners have convincingly shown, the Second Circuit's "volitional act" precondition to liability for copying has no basis in statute and conflicts with this Court's precedent. See Pet. at 24-29. Indeed, as even the primary case relied on by the Second Circuit recognizes, "copyright is a strict

liability statute." *Religious Tech. Ctr. v. Netcom Online Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). Because Cablevision copies copyrighted works without authorization, it is liable as a direct infringer. 17 U.S.C. §§ 106(1), 501(a).

Not only does the Act clearly provide for liability for flagrant copying like Cablevision's, but the Second Circuit's ruling deviates from settled precedent providing that an infringing service is not shielded from direct liability by responding automatically to consumer requests. *See* Pet. at 24-29. In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), this Court held defendants directly liable for their copying and distribution of a vast array of copyrighted electronic content delivered to users automatically upon request, reasoning that the defendants – like Cablevision here – "are not merely selling 'equipment'; they are selling copies of the Articles." *Id.* at 504. Similarly liable for direct infringement have been a variety of "automated" services that violate copyright "automatically" at a user's command. *See, e.g., Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (automated telephone service for listening to remote radio broadcasts); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991) (on-demand transmission of movies to hotel guests); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (table decision) (automated Internet service delivering copyrighted images to users).

The Second Circuit's decision is also in sharp conflict with the established rule that "copyshops" are directly liable for making infringing university "coursepacks" where the shops exercise "control" over the copying process – just as Cablevision does here. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526, 1546 (S.D.N.Y. 1991); *see Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1383 (6th Cir. 1996). In these cases, it was no defense to the copyshops' liability for direct infringement that they acted at the direction of professors and students in making copies of copyrighted works without paying royalties. Rather, it was plain, as here, that despite acting at others' request, the copyshops controlled the copying process and could have – but simply chose not to – obtain the required licenses that would have cut into their profits.

The Second Circuit found these critical cases inapposite, claiming that "Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises." Pet. App. 22a. The Second Circuit's analogy is wrong. In fact, Cablevision presents an even stronger case for direct infringement than the established copyshop cases, because it is Cablevision that is bringing the content to the customer, not the other way around. If anything, Cablevision resembles a store proprietor *who stocks his shelves with copyrighted works* and charges a subscription fee to customers for copying and transmitting those works. Such a proprietor is plainly liable under the "copyshop" cases, which are

irreconcilable with the Second Circuit's ruling at issue here.[2] Moreover, given (1) the size of the proprietor (Cablevision), (2) its ability to disseminate works on an enormous scale, (3) that others may seek to emulate Cablevision's example if the Second Circuit's ruling stands, and (4) the digital (and therefore exponentially replicable) nature of the copyrighted content that Cablevision is transmitting, Cablevision presents a far greater threat to the value of *Amici*'s copyrights than the entities found liable in the above-cited cases.

Faced with this considerable contrary precedent, the Second Circuit sought refuge in the *Netcom* decision, in which the Northern District of California exempted an Internet service provider ("ISP") from direct liability "for incidental copies automatically made on [its] computers using their software as part of a process initiated by a third party." 907 F. Supp. at 1369. According to the Second Circuit, "*Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made," as "volitional conduct is an important element of direct liability." Pet. App. 20a, 22a. But the Copyright Act does not contain or support any such "volitional" requirement for direct liability. As even *Netcom*

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[2] The copyshop cases also confirm that whether the customers have a "fair use" defense to direct infringement is completely irrelevant to the imposition of direct liability for copying where, as here, the copying is "performed on a profit-making basis by a commercial enterprise." *Princeton Univ. Press*, 99 F.3d at 1389.

recognized, "copyright is a strict liability statute." 907 F. Supp. at 1370.

In any event, the Second Circuit simply ignored the crux of *Netcom*: there, the ISP lacked "volition" because "Netcom does not create or control the content of the information available to its subscribers." *Id.* at 1368. *Netcom* expressly conditioned exemption from direct liability on the fact that the "copies are uploaded by an infringing user" – not Netcom – and that "Netcom does not maintain an archive of files for its users." *Id.* at 1371, 1372. *Netcom* also repeatedly emphasized that its ruling was based on the unique context of ISPs providing passive conduit service to the millions of users constantly exchanging data on the Internet. *See id.* at 1372 (Netcom "merely provides access to the Internet"). *Netcom* simply has no application other than in the unique context of an ISP acting as a passive conduit, in which "billions of bits of data flow through the Internet and are necessarily stored on services throughout the network." *Id.*

Cablevision is not an ISP. Moreover, in stark contrast to the ISP in *Netcom*, which, "d[id] not create or control the content of the information available to its subscribers" but "merely provide[d] access to the Internet," 907 F. Supp. at 1372, Cablevision "aggregate[s] television programming" and thus has "control over the content available for recording," Pet. App. 4a, 6a. *Netcom* plainly does not excuse Cablevision's provision and marketing of a

vast library of copyrighted works for copying and playback, and the entire means to do so.[3]

Finally, the Second Circuit's ruling is based on the fundamentally flawed premise that there can be only one "copier" (or "volitional copier"), incorrectly asking "who actually 'makes' a copy" and whether Cablevision "displace[s] the customer as the person who 'makes' the copies." Pet. App. 22a, 23a. But here, as with many digital providers that make content available to users, there are at least two "copiers" – the customer and Cablevision. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) ("a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm"). Given that Cablevision designed, constructed and operates the entire copying apparatus, Pet. App. at 20a, and that

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[3] Even in the limited context of an ISP, *Netcom* set forth a minimal conception of "volition" and did not require, as the Second Circuit now appears to, active human intervention in each act of copying. *Compare* Pet. App. 22a ("a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make a copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct"), *with Netcom*, 907 F. Supp. at 1370 (describing "some element of volition or causation [that] is lacking where a defendant's system is merely used to create a copy by a third party").

it charges subscribers for the copies, it is nonsensical to claim that Cablevision is not a copier.[4]

2. The Second Circuit's "volitional act" requirement is wrong, and it threatens a harmful effect upon *Amici*'s copyrighted works. *Amici* have worked hard to foster lawful services that are authorized to provide consumers with a variety of new means of accessing copyrighted digital media. For example, there has been an explosion of lawful Internet sites for purchasing digital sound recordings (such as Apple's iTunes) and "streaming" such content (such as RealNetworks' Rhapsody). *See* http://www.riaa.com/toolsforparents.php?content_selector=legal_music_sites (listing legal online music sources). Digital "e-books" are increasingly available online for download and reading on viewers such as the Sony Reader and Amazon Kindle. As shown by these representative examples, in the digital age, content holders such as *Amici* routinely authorize businesses to employ emerging technologies to distribute content for a fee via automated processes.

Many of these services are, in all meaningful respects, "automated" – at least with respect to the Second Circuit's understanding of that term. And they will only continue to become more so as technology improves. Yet, to date, and for good reason, the copying, distributing and transmitting of

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[4] As Petitioners have shown, secondary liability is irrelevant to Cablevision's liability for direct infringement and, in any event, is no substitute. *See* Pet. at 20-21.

Amici's works through these services have been accorded full copyright protection – regardless whether these services "automatically produce[] copies on command," and despite the "customer's conduct in ordering that system to produce a copy of a specific program." Pet. App. 20a, 22a.

The Second Circuit's erroneous "volitional act" ruling therefore poses a serious threat to *Amici*'s protected content. If that ruling stands, an Internet service that currently obtains authorization to use copyrighted digital content might try to claim that it needs no authorization because a subscriber (rather than the service itself) selects the works to download and receives the downloads through an automated process. *Cf.* Pet. App. 20a, 22a. Similarly, an interactive music streaming service might try to argue that it need not obtain authorization because, once again, subscribers choose the music, which is then delivered by a system "which automatically obeys commands and engages in no volitional conduct." Pet. App. 22a. The same would be true for services that provide e-books and other copyrighted content for online distribution or access.[5]

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[5] Although the Second Circuit's erroneous "public" performance ruling, *see infra* Section II, purported not to resolve whether Cablevision "does" the performing (in contrast to the copying) in light of the "automatic" nature of Cablevision's system, Pet. App. 28a, the Second Circuit's flawed rationale for exempting "automatic" copying also threatens to exempt the "automatic" infringement of *Amici*'s other protected rights in their

The Second Circuit's ruling also provides wrongheaded encouragement to illegitimate services that seek to exploit digital content without compensating copyright owners, including *Amici*. The Second Circuit's ruling incentivizes these would-be mass infringers to automate copying in order to avoid liability for direct infringement, even though such services know full well that copyrighted works will be massively copied by and stored on their servers – as the services are making the copyrighted works available to customers in the first place. In fact, just last week, authors and book publishers reached a settlement with Google regarding Google's ongoing attempt to provide digital copies of millions of copyrighted books to its billions of users without seeking permissions or compensating copyright holders. *See* Association of American Publishers Press Release (Oct. 28, 2008), *available at* http://www.publishers.org/main/Copyright/Google/Release.htm. If the Second Circuit's "automation" exemption to copyright infringement stands, copyright owners like these will be hampered in protecting their digitized works from rampant copying, distribution and transmission.

The Second Circuit's ruling also jeopardizes the continued existence of legitimate services, such as iTunes and Rhapsody, which have worked with

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works – such as distribution, performance and display. *See* 17 U.S.C. § 106. The Second Circuit's ruling should therefore be put to rest before it is used to erode copyright protection in digital works entirely.

Amici and other copyright owners to provide lawful, authorized access to protected works. It is these lawful services that embody the economic incentive system at the heart of copyright law – not services like Cablevision's RS-DVR, which seeks to profit from creators without compensating them fully. Indeed, the rapid and widespread emergence of services like iTunes and Rhapsody makes clear that, far from chilling emerging technology, protecting copyright in the digital age by requiring authorization and punishing direct infringement simply ensures that creators are properly compensated as incredible innovation continues to unfold. Conversely, the Second Circuit's decision encourages the development of inefficient technology specifically designed to avoid compensating creators.

II. The Second Circuit's Definition Of "Public" Performance Is Contrary To The Act And Threatens A Damaging Effect On *Amici* And Settled Practices For Licensing Their Protected Digital Works.

1. The Second Circuit also radically and erroneously narrowed copyright holders' "public" performance right. According to the Second Circuit, because "each RS-DVR transmission is made to a given subscriber using a copy made by the subscriber, . . . such a transmission is not 'to the public,'" Pet. App. 39a, as required for protection under the Act, *see* 17 U.S.C. §§ 101, 106(4), (6).

As Petitioners have clearly shown, the Second Circuit's ruling cannot be squared with the

Copyright Act or settled law. *See* Pet. at 33-39. Separate "on-demand" transmissions of a performance to different customers at different times constitute a "public" performance that is protected under Section 101 of the Act. *See id.* Indeed, the Act's definition of a "public" performance plainly covers individual, on-demand digital transmissions, such as those at issue here. *See* 17 U.S.C. § 101 ("public" performance includes "transmit[ting] or otherwise communicat[ing] a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in the separate places and at the same time or at different times").

Although Section 101 is dispositive, *Amici* include owners of protected sound recordings and thus emphasize that the Second Circuit's interpretation of "public" also is plainly contrary to Section 114 of the Act, which covers the "scope of exclusive rights in sound recordings." 17 U.S.C. § 114. Section 114 repeatedly refers to the "public" performance right at issue in the Second Circuit's ruling, specifically addressing this right in the context of "interactive" or "on-demand" services for digital sound recordings, *e.g.*, *id.* § 114(d)(3). As Petitioners briefly note, Section 114, like other provisions of the Act, "treats on-demand transmissions to individual members of the public as public performances," Pet. at 34 n.7, and thus demonstrates that the Second Circuit's ruling to the contrary is incorrect.

To put this point in context, in 1971, Congress first recognized a copyright in sound recordings; compositions, by contrast, enjoyed prior protection. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102). At that time, Congress did not provide for a performance right for sound recordings. *See id.*

With the rapid rise of both improving digital technology and increasingly prevalent means of widely transmitting digital content (such as satellite, cable, and the Internet), in 1995 Congress enacted a performance right for digitally transmitted sound recordings. *See* Digital Performance Right in Sound Recordings Act of 1995 ("1995 Act"), Pub. L. No 104-39, 109 Stat. 336 (1995) (codified as various amendments to 17 U.S.C.). This new legislation recognized, "in the case of sound recordings," a right "to perform the copyrighted work *publicly* by means of a digital audio transmission" (emphasis added)); 17 U.S.C. § 106(6). Thus, as of 1995, digital sound recordings received "public" performance protection, just like other copyrighted works. *See id.* § 106(4).

As the legislative history of the 1995 Act makes clear, the purpose of the Act was to protect "sound recordings which are *publicly performed* by means of a digital transmission." S. Rep. No. 104-128, at 10 (1995) (emphasis added), *as reprinted in,* 1995 U.S.C.C.A.N. 356. That same legislative history shows that Congress clearly understood – consistent with Section 101 of the Act and contrary to the Second Circuit's ruling – that "public" performances

include "on-demand" digital transmissions, despite that members of the public receive separate "on-demand" transmissions:

> Trends within the music industry, as well as the telecommunications and information services industries, suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future. Some digital transmission services, such as so-called "celestial jukebox," "pay-per-listen" or "audio-on-demand" services, will be interactive services that enable a member of the public to receive, on request, a digital transmission of the particular recording that person wants to hear.
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> * * *
>
> The Committee believes that copyright owners of sound recordings should enjoy protection with respect to digital subscription, interactive and certain other such performances.

Id. at 14, 15; *see also* H.R. Rep. No. 104-274 (1995).

The Section 114 statutory licensing provisions enacted by Congress in 1995 regarding on-demand sound recordings confirm what this legislative history makes obvious: "public" performances include on-demand transmissions such as those stripped of protection by the Second Circuit.

First, the 1995 Act defines an "interactive service" as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7). Thus, Congress plainly understood that on-demand transmissions selected by individual customers – like Cablevision's transmissions here – are "public" performances protected by the Act. *Id.*

Second, the licensing provisions regarding "interactive" services for sound recordings clearly contemplate that such transmissions are, in fact, "public" performances. *See, e.g.*, 17 U.S.C. § 114(d)(2)(addressing "[t]hc performance of a sound recording publicly by means of a subscription digital audio transmission"); *id.* § 114(d)(3)(C) (conditioning when "an interactive service may . . . publicly perform a sound recording"); *id.* §§ 114(d)(3)(A)-(B).

Additional 1998 amendments to Section 114 further confirm this point. As part of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as various amendments to 17 U.S.C.), Congress extended "public" performance rights to "webcasts" of digital sound recordings – *i.e.*, non-interactive transmissions of sound recordings to individual users. *See* 17 U.S.C. § 114(j)(6). Again, as with the individualized "interactive" transmissions covered by Congress in 1995, the 1998 amendments were premised on the fact that each webcast

transmission to an individual user – like each of Cablevision's individual transmissions – is a covered transmission "provide[d] to the public." *Id.*

Section 112 of the Act, which pertains to "ephemeral recordings," further demonstrates the error of the Second Circuit's "public" performance ruling. Ephemeral recordings are copies of sound recordings that are "created for the purpose of facilitating a transmission of a public performance of a sound recording." 17 C.F.R. § 262.2(f). Section 112 is premised on the fact that such copies are made by the service, not the end-user, and subjects such copying to clear limitations. *See, e.g.*, 17 U.S.C. §§ 112(a), (e). Like Section 114, the premise of Section 112 is that the individual transmissions to the public enabled by the ephemeral recordings are "public" performances protected by the Act. *See id.*[6]

Accordingly, the Second Circuit's holding that "RS-DVR playback transmission[s] . . . made to a single subscriber using a single unique copy produced by that subscriber . . . are not performances 'to the public,'" Pet. App. 41a, is contrary to the Act and clear error. Indeed, were the Second Circuit's interpretation of the term "public" correct, then Section 114's entire licensing scheme

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[6] The Second Circuit's holding that Cablevision is not the "copier" of the copies that it uses for its transmissions, *see supra* Section I, is also contrary to the established understanding in the sound recording context that ephemeral recordings are made by the service, not the end-user.

for digital sound recording transmissions would be meaningless because, according to the Second Circuit, transmissions to individual members of the public are, by definition, not "public" performances entitled to copyright protection. Nothing in Section 114 remotely suggests an exception to its licensing requirements for services transmitting performances to individual subscribers from separate copies of a recording associated with each subscriber. To the contrary, as the Act repeatedly makes plain – and contrary to the Second Circuit's strained reasoning – "public" performances include individual transmissions to individual consumers.[7]

2. As Congress correctly foresaw in 1995, digital content – including sound recordings and other protected works of *Amici* – increasingly reaches

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[7] Although the Second Circuit claimed that its "public" performance ruling did not depend on whether Cablevision or the customer "does the transmitting," Pet. App. 28a, the Second Circuit's flawed interpretation of "public" performance appears to have stemmed in part from its erroneous ruling that the customers, not Cablevision, make the copies stored on Cablevision's server and used for the individual transmissions. *See, e.g.*, Pet. App. 36a (holding that the transmissions are not "public" because "each RS-DVR transmission is made to a given subscriber *using a copy made by that subscriber*" (emphasis added)). That the Second Circuit's unprecedented interpretation of "public" performance relies on its clearly erroneous "volitional act" ruling, *see supra* Section I, weighs strongly in favor of this Court's review of both of these important questions.

consumers via individualized, on-demand transmissions. As this mode of transmission has proliferated, *Amici* have painstakingly worked with lawful transmitters of digital content to make *Amici*'s copyrighted content available to the public on an "on-demand" basis. These efforts have included widespread authorization of *Amici*'s digital content so that *Amici*'s works are available to the public while creators are compensated for the public performance of their works. *See supra* p.11.

The Second Circuit's "public" performance ruling threatens to damage copyright protection of the works of *Amici* and other creators in this "on-demand" digital age. To begin with, the Second Circuit's ruling cannot stand because it will upend the settled licensing system for digital sound recordings set forth in Section 114 of the Act and described above. The Second Circuit's holding that individual on-demand transmissions are not "public" performances simply cannot be reconciled with Section 114, which is based on exactly the opposite premise: that individual on-demand transmissions *are* "public" performances which must be licensed to be used lawfully. This ruling will undermine those on-demand services lawfully licensing *Amici*'s recordings while encouraging services that engage in rampant unlicensed copying and transmission to attempt to adapt their technology to fit within the Second Circuit's holding. Given the potentially sweeping consequences of the Second Circuit's ruling for these settled licensing practices, this Court's review is urgently needed.

The consequences of the Second Circuit's "public" performance ruling are not, however, limited to the licensing system for sound recordings. Were the Second Circuit's ruling to stand, it threatens to render the public performance right effectively meaningless in the digital context. As Congress aptly observed in 1995, and as developments since have confirmed, technology is rapidly moving toward enabling consumers to receive a wide variety of copyrighted content on an on-demand basis – including books, movies, television shows, sound recordings and video games. Indeed, Cablevision's own technology demonstrates the ease with which services like Cablevision can create literally millions of individual "transmissions" of the same copyrighted content (based on massive copying of that copyrighted content), in order to provide each member of the public with his or her "own" transmission. Yet, under the Second Circuit's ruling, each of these individual transmissions is not a "public" performance – and thus unprotected.

It is both contrary to the Act and perversely unacceptable that, under the Second Circuit's ruling, the copying and on-demand transmission of the same digital content to millions of people is sanctioned as "non-public," Pet. App. 32a, but that the transmission of a VCR tape from the front desk of a video rental store to individuals or small groups in "private booths" at the same store is a protected "public performance under . . . the statutory definition," Pet. App. at 37a-38a (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d

154, 156-57 (3d Cir. 1984)). Congress simply could not have intended such an absurd result. And it did not. As clearly established by the Act's language and all decisions prior to the Second Circuit's, "on-demand" transmissions to individual members of the public are protected "public" performances.[8]

Not only does the Second Circuit's decision senselessly strip settled copyright protections, but it perversely incentivizes copying of protected works by entities like Cablevision for the sole purpose of creating individualized transmissions to subvert the "public" performance right. Services should not be

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[8] The Second Circuit inexplicably claimed that *Redd Horne* "supports our decision." Pet. App. 37a. In contrast, the Second Circuit rejected as "untenable" the on-point precedent of *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991). Pet. App. 40a. *On Command* found infringement of the "public" performance right by a hotel that operated an "innovative video viewing system" that permitted hotel occupants to use their in-room television remote control to select movies, which were then automatically transmitted to occupants' rooms from a bank of VCRs in a central area of the hotel. 777 F. Supp. at 788, 789-90. *On Command* correctly determined – in stark conflict with the Second Circuit – that "[t]he fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial," and that "whether the number of hotel guests viewing an On Command transmission is one or one hundred, . . . the transmission is still a public performance since it goes to members of the public." *Id.* at 790.

encouraged to evade the "public" nature of performances simply by creating millions or billions of unique copies. To the contrary, they should license the protected content as Congress clearly intended they do.

III. The International Implications Of The Second Circuit's Ruling For The United States And International Rightholders Further Necessitate This Court's Review.

Although the severe domestic consequences of the Second Circuit's ruling alone warrant this Court's review, the ruling's damaging international implications also necessitate review. The Second Circuit's failure to protect established rights of copyright holders would directly conflict with multiple international agreements to which the United States is a party. Moreover, the Second Circuit's ruling will serve as an open invitation to compromise copyright protection worldwide.

Under the terms of several international agreements, the United States is required to provide copyright owners the exclusive rights to authorize or prohibit the reproduction of their works in any manner or form.[9] In addition, the WCT and the

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[9] These agreements include: the Berne Convention, the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), April 15, 1994, 33 I.L.M. 81 (1994); the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT"), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36

WPPT, two World Intellectual Property Organization treaties from the mid-1990s known as the "internet treaties," *see supra* n.9 – updated international copyright standards to ensure the adequate protection of works in the digital era. Among other things, these treaties include a "making available" right to cover "on demand" technology in which consumers "pull" digital works at a time and place of their choice.[10]

By immunizing Cablevision from "public" performance liability for its on-demand transmissions, the Second Circuit's ruling fails to protect the "digital, interactive transmissions" of copyrighted material that the WCT and WPPT clearly cover and that the United States is therefore obligated to protect. *See* MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET 503 (Oxford 2002).

I.L.M. 65 (1997); the WIPO Performances and Phonograms Treaty ("WPPT"), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997); and various bilateral free-trade agreements ("FTAs") with, for example, Jordan, Chile, Singapore, Australia, Morocco, Bahrain

[10] *See, e.g.*, WCT Art. 8 (requiring signatories to provide authors "the exclusive right of authorizing . . . the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"); *see also* WPPT article 14; FTAs cited in *supra* n.9.

Further, by immunizing Cablevision's mass copying and distribution of copyrighted works because of the supposedly "automated" nature of its service, the Second Circuit's ruling also places the United States in potential breach of its obligations under international agreements to protect copyright owners from unauthorized reproduction of their works.[11] Just as there is no exception to direct liability for "automated" infringement services under domestic law, *see supra* Section I, these agreements permit no such exception.

More broadly, the Second Circuit's decision is likely to have dangerous consequences abroad and serve as a hindrance to international commerce, as other countries regularly look to the United States for guidance regarding copyright protections in the digital age. Courts worldwide – including in Japan, Korea, Taiwan and Australia – have cited and relied on critical decisions of this Court and the Courts of Appeals regarding digital copyright, such as *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The Second Circuit's ruling also may encourage the United States' trading partners to interpret their treaty

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[11] All international copyright agreements require such protection, *see, e.g.*, Berne Convention Art. 9(1), and the internet treaties specifically provide that this right extends to "storage of a protected work in digital form in an electronic medium," WCT Agreed Statement to Art. 1(4); WPPT Art. 7.

obligations too narrowly, leading to a rising global tide of unauthorized and uncompensated use of creative works. Digital distribution of music and other works is increasingly global, but for multi-territory deals and lawful international commerce to thrive, all jurisdictions – including the United States – must meaningfully and consistently apply internationally agreed copyright protections. The Second Circuit's decision, which directly undermines such protections, should not be permitted to gain globally harmful force.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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